

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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IN RE SEPTEMBER 11 LITIGATION	:	<u>ORDER DENYING MOTION</u>
	:	<u>TO ENFORCE AGREEMENT</u>
-----	:	<u>FOR SETTLEMENT</u>
MICHAEL KEATING	:	
	:	21 MC 101 (AKH)
Plaintiff,	:	02 Civ. 7156 (AKH)
	:	
-against-	:	
	:	
AMERICAN AIRLINES, INC., et al.	:	
	:	
Defendants.	:	
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ALVIN K. HELLERSTEIN, U.S.D.J.:		

Barbara Keating was a passenger aboard American Airlines Flight Number 11 who lost her life when the terrorists of 9/11 hijacked her airplane and crashed it into One World Trade Center. She was in her early seventies when she died, widowed, and retired with a modest income.

This lawsuit, alleging a right to recover because of her wrongful death, was brought by Michael Keating, one of her five children. He and his siblings were over 21 when their mother was killed, and there is no allegation that any were dependent on her. Michael Keating filed suit individually and as personal representative of the Estate of Barbara Keating, on behalf of all beneficiaries, survivors, and heirs.¹ He does not allege

¹ Under New York law,
[t]he personal representative, duly appointed in this state or any other jurisdiction, of a decedent who is survived by distributees may maintain an action to recover damages for a wrongful act, neglect or default which caused the decedent's death against a person who would have been liable to the decedent by reason of such wrongful conduct if death had not ensued.
N.Y. Est. Powers & Trusts § 5-4.1. The statute "confers on the personal representative of an estate the right to sue for damages for the decedent's wrongful death on behalf of the decedent's distributees who suffered pecuniary loss because of his death." *Id.* cmt.

his legal status as a court appointee, only that he is the “personal representative” of his late mother’s estate, bringing suit on behalf of her five children and ten grandchildren.

Plaintiff now moves for enforcement of the settlement agreement that he claims he and his attorneys reached with Defendants American Airlines, Inc. (“American”), AMR Corporation (“AMR”), and Globe Aviation Services Corporation (“Globe”). I hold, however, that there is insufficient evidence that Globe assented to the alleged agreement, or that an agreement could be reached with some, but not all, defendants, and no signed copy of the agreement has been proffered. Accordingly, the motion is denied.

Plaintiff filed this action on September 9, 2002, one of 95 wrongful death and personal injury claims. The parties in all actions began settlement negotiations in 2005 and established a procedure for handling settlements. See Taylor Decl. Ex. A (July 20, 2005 Letter from Desmond T. Barry, Jr., to Joseph F. Rice); Pl.’s Mem. Ex. 1 (May 3, 2006 Letter from Desmond T. Barry, Jr. to Honorable Alvin K. Hellerstein). Once a settlement is negotiated, the defendants would draft the settlement documents and send them to plaintiffs’ counsel for review and approval. Id. If plaintiffs’ counsel approved, they would execute the Confidential Stipulation of Settlement. Id. Within 21 days after execution, the settling defendants were required to submit their Air Transportation Safety and System Stabilization Act (“ATSSSA”) motion for an order approving the settlement as reasonable, ruling that all amounts paid pursuant to the settlement count against the ATSSSA limitation on liability, directing entry of a final judgment, and dismissing the case with prejudice as to all defendants. Id. The motion would include a redacted copy of the Confidential Stipulation of Settlement with the settlement amount omitted, and an unredacted copy filed under seal. Because of the ATSSSA limitation on liability, the

Court required that the Property Damage and Business Loss Plaintiffs, the Ground Defendants, the World Trade Center Entities, and the Port Authority of New York and New Jersey be given the opportunity to review and object to settlements involving American Airlines Flight 11 or United Airlines Flight 175. See Stipulation and Order Regarding Settlements, 21 MC 101 (Doc. No. 82).

With regard to the Keating case, on July 29, 2009, counsel for American wrote to Plaintiff's counsel confirming that the parties had agreed on a monetary settlement figure. See Pl.'s Mem. Ex. 2 (July 29, 2009, letter from Desmond T. Barry, Jr., to Joseph F. Rice). The letter also indicated that the parties were working on a stipulation to address the removal of confidentiality designations from documents to be released to the September 11 Memorial (the "Stipulation"). Id. The parties have not yet agreed on the Stipulation.

Plaintiff states that on August 11, 2009, Defendants' counsel forwarded settlement documents to Plaintiff's counsel for Plaintiff's signature. On September 14, 2009, Defendants advised that they had received the settlement stipulation signed by the Plaintiff, and that they expected to file a motion for court approval of the settlement as soon as possible. However, Globe's signature had not yet been obtained and counsel for American emailed Plaintiff's counsel on September 22, 2009, to so advise. Although at a status conference Defendants' liaison counsel stated that "we consider . . . Keating . . . to be settled." 21 MC 101, Tr. of October 15, 2009 Conference at 7:16-17, and, further, on December 4, 2009, that the Keating settlement funds would be deposited in an interest earning account on that date, Globe did not sign.

Globe informed Plaintiff on November 30, 2009, that Keating had to be settled with another wrongful death case, Low v. U.S. Airways Inc., 03 Civ. 7040 (AKH). At the January 6, 2010, status conference in the 21 MC 101 litigation, counsel for Globe stated that there is a “non-monetary element to the Low case which has run into a snag.” 21 MC 101, Tr. of January 6, 2010 Conference at 33:6-8. This non-monetary element is presumably the Stipulation removing confidentiality designations from documents as to which the parties have not yet agreed.

Defendants argue that agreement on the Stipulation is a condition precedent to finalization of the settlement. Plaintiff argues that the Stipulation is independent from the settlement agreement and need not be finalized for the settlement to go forward.

On January 20, 2010, Plaintiff apparently sent to Defendants a revised draft of the settlement agreement indicating that settlement was conditioned on finalization of the Stipulation. But in Plaintiff Keating’s reply memorandum, Plaintiff states that the Keatings are not insisting that the settlement include the Stipulation. Pl.’s Reply Mem. at 3 n.2.

Settlement agreements are construed according to contract law principles. Lindner v. Am. Express Corp., 06 Civ. 3834 (JGK), 2007 WL 1623119, at *3 n.1 (S.D.N.Y. June 5, 2007) (“In practice, both the Court of Appeals for the Second Circuit and district courts have applied the highly developed New York State law of contracts to determine the validity of alleged settlement agreements allegedly entered into in this state.”). A valid settlement agreement must consist of an offer, acceptance, consideration, mutual assent and an intent to be bound. Leibowitz v. Cornell University, 584 F.3d 487, 507 (2d Cir. 2009). The fundamental basis of a valid and enforceable

contract is a meeting of the minds on all essential terms. Schurr v. Austin Galleries of Illinois, Inc., 719 F.2d 571, 576 (2d Cir. 1983).

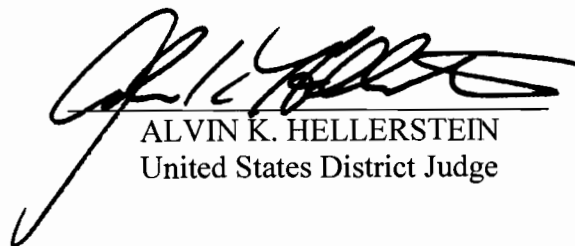
The parties' exchanges and submissions to the court make it clear that there has not been agreement on all material terms. Accordingly, there is, as of now, no enforceable agreement. And this is quite apart from the necessity of court approval.

It should be noted that nothing in this Order bears on my eventual decision regarding the reasonableness of any settlement. See, e.g., In re September 11 Litigation, 567 F. Supp. 2d 611 (S.D.N.Y. 2008) (rejecting settlements of four wrongful death suits because settlement amounts were unreasonably disproportionate to settled values)

For the reasons stated above, I deny Plaintiff's motion. The Clerk shall mark the motion (Doc. # 1026) as terminated.

SO ORDERED.

Dated: February 4, 2010
New York, New York


ALVIN K. HELLERSTEIN
United States District Judge